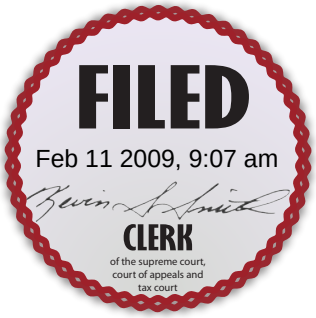

ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DESMOND TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0807-CR-650
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARIONN SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0612-FD-241372

February 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Desmond Turner was convicted of battery by body waste, a Class D felony, and resisting law enforcement, a Class A misdemeanor. Turner was sentenced to concurrent terms of three years for the battery conviction and one year for the resisting arrest conviction. Turner raises one issue on appeal: whether the trial court properly denied his motion to sever the charges for trial. Concluding that Turner was not entitled to severance as a matter of right, we affirm.

Facts and Procedural History

On December 14, 2006, Turner was an inmate in the Marion County Jail. Deputy Sean Gray and Corporal Dustin Stidd were asked to escort Turner from his cell to an interview room to meet with his attorney. Turner was secured by a belly chain with handcuffs and leg shackles, and the officers walked on either side of Turner, each holding one of his arms. As they walked, Turner became "very verbal," transcript at 64, stating that "he needed more respect and [officers had] better watch out," id. at 65. Turner complained that "[h]e didn't like the way he was being escorted." Id. at 113. When they arrived in the interview room, Turner turned and elbowed Officer Stidd in the face as Officer Stidd attempted to pull a chair out for Turner. Turner continued to swing his elbows and also hit Deputy Gray. Deputy Gray brought Turner to the ground where Turner continued to resist.

When Turner was brought under control, Deputy Gray and Sargeant Maurice Frazier brought Turner to his feet and he was escorted back to his cell. At Turner's request, Captain Emil Daggy came to the cell block to speak with Turner. Lieutenant

Anthony Shidler was nearby and could hear Captain Daggy's conversation with Turner. Turner complained to Captain Daggy that he "didn't like the way the officers treated him" and "wanted to be respected." Id. at 199. Turner became agitated and loud. Lieutenant Shidler heard "a hochering sound, or a gathering of spit," id. at 182, and saw Captain Daggy wipe his face. Captain Daggy testified that Turner spit on him three times before he was able to move out of the way.

Turner was charged with three counts of battery by body waste, all Class D felonies, for spitting on Captain Daggy; one count of battery on an officer, a Class D felony, for hitting Corporal Stidd; and one count of resisting law enforcement, a Class A misdemeanor. The State later dismissed two of the battery by body waste counts. Turner filed a motion to sever the battery by body waste count from the battery and resisting law enforcement counts pursuant to Indiana Code section 35-34-1-11(a), alleging that they were joined "solely because the offenses were similar in character." Appellant's Appendix at 93. The trial court denied Turner's motion and the case proceeded to a jury trial. The jury found Turner guilty of battery by body waste and resisting law enforcement, but not guilty of battery on Corporal Stidd. Turner now appeals.

Discussion and Decision

Turner contends the trial court erred when it denied his motion to sever the charges. In ruling on such a motion, the trial court is guided by statute. Indiana Code section 35-34-1-9(a) provides:

> Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
>
> (1) are of the same or similar character, even if not part of a single scheme or plan; or
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Indiana Code section 35-34-1-11(a) provides:

> Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
>
> (1) the number of offenses charged;
> (2) the complexity of the evidence to be offered; and
> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

When two or more charges are joined for trial solely because they are of the same of similar character, the defendant is entitled to severance as a matter of right. Blanchard v. State, 802 N.E.2d 14, 25 (Ind. Ct. App. 2004). We review arguments that the trial court improperly denied a motion to sever as a matter of right de novo. Booker v. State, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003), trans. denied. If the defendant was not entitled to severance as a matter of right, the decision whether to sever the charges is committed to the trial court's discretion, and we will reverse only for an abuse of that discretion. Ben-Yisrayl v. State, 690 N.E.2d 1141, 1146 (Ind. 1997), cert. denied, 525 U.S. 1108 (1999).

Turner alleged in his motion to sever that the charges were joined solely because they were of the same or similar character. He contends that the offenses are not connected because "they were committed in different locations inside the jail, involved

different victims and a different means was used in the batteries (spitting v. elbowing)." Brief of Defendant-Appellant at 9. Turner also noted in his motion that the offenses occurred an hour and a half apart. See Appellant's App. at 93. Turner relies on Goodman v. State, 708 N.E.2d 901 (Ind. Ct. App. 1999) and Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992), to support his argument.

In Pardo, the defendant was charged with four counts of theft for a September incident in which he was alleged to have entered a number of cars in a parking lot and taken their stereos, acting with his brother and an unidentified accomplice. The defendant was also charged with attempted theft in connection with an incident in November in which the owner of a car saw a man in his car and observed that the car's window was smashed and its dashboard torn apart. The defendant's motion to sever the September theft charges from the November attempted theft charge was denied. We reversed, rejecting the State's contention that the offenses were a series of acts connected together. 585 N.E.2d at 695. There was no evidence that the September thefts and the November attempted theft were parts of a single scheme or plan to steal property from cars; the defendant was not detected as the result of continuous surveillance; the crimes were not connected by a distinctive nature; and the crimes did not evidence a common modus operandi. Id. Because the charges were joined solely because they were of the same or similar character, the defendant was entitled to severance and the trial court lacked discretion to deny his motion. Id.

In Goodman, the defendant stole a riding lawn mower from a rural home in early May 1997, stole property from an unoccupied home in late May or early June 1997, and

broke into a locked freezer at a restaurant and stole food in early June 1997. During this time, the defendant was also in possession of a toolbox that had been reported stolen. The trial court denied the defendant's motion to sever the resulting theft and burglary charges from each incident. We again rejected the State's contention that the offenses were a single scheme for burglarizing and stealing, noting that the crimes all involved different victims, different property, and different locations over a period of approximately one month and "were not connected together in any apparent manner." 708 N.E.2d at 903. We therefore held the trial court lacked discretion to deny severance. Id.

We cannot agree with Turner that there was no connection between the incident with Corporal Stidd and the incident with Captain Daggy. This is not a case of unrelated incidents separated by weeks or months as in Pardo and Goodman. Turner was unhappy with the way he was treated by the officers who escorted him to an interview room. He expressed that unhappiness directly to them by hitting them and resisting their attempts to subdue him. Within a short time after that incident, he also expressed his unhappiness to the jail captain, ultimately spitting in the captain's face. Turner's argument stretches too far the Pardo/Goodman concept of "different victims in different locations over a period of time" precluding crimes being a series of acts connected together. The evidence is sufficient to show a series of acts connected together and not simply offenses that are of the same or similar character. Thus, severance was not mandated as a matter

of right and the matter was committed to the trial court's discretion. [1]

Conclusion

Turner was not entitled to severance as a matter of right and the trial court did not abuse its discretion in denying his motion to sever. The judgment of the trial court is affirmed.

Affirmed.

CRONE, J., and BROWN, J., concur.

[1] Turner concedes that if the joinder was not solely because of the same or similar nature of the charges, he cannot show an abuse of discretion. See Br. of Defendant-Appellant at 10.